

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HERBERT D. EASH, III,

Plaintiff,

v.

MICHAEL J. ASTRUE¹, Commissioner of
Social Security,

Defendant.

CASE NO. C06-5690RJB-KLS

REPORT AND
RECOMMENDATION

Noted for October 5, 2007

Plaintiff, Herbert D. Eash, III, has brought this matter for judicial review of the denial of his application for disability insurance benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Honorable Robert J. Bryan's review.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff currently is 37 years old.² Tr. 25. He has a high school diploma, some college education

¹Pursuant to Federal Rule of Civil Procedure 25(d)(1), Michael J. Astrue, who recently became acting Commissioner of Social Security, hereby automatically is substituted for Joanne B. Barnhart.

²Plaintiff's date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 and past work experience as a restaurant manager, a server, an applications tester, a Lotus Notes
 2 administrator, a website developer, a store merchandise assembler, and a customer service clerk. Tr. 21,
 3 69, 74, 86, 426.

4 On August 13, 2003, plaintiff filed an application for disability insurance benefits, alleging
 5 disability as of June 5, 2002, due to post traumatic stress disorder (“PTSD”), headaches, problems in both
 6 his hands and knees, irritable bowel syndrome, and rhinitis. Tr. 12, 25, 53-55, 68. His application was
 7 denied initially and on reconsideration. Tr. 12, 25-27, 36. A hearing was held before an administrative law
 8 judge (“ALJ”) on October 20, 2005, at which plaintiff, represented by counsel, appeared and testified, as
 9 did a vocational expert. Tr. 422-73.

10 On May 25, 2006, the ALJ issued a decision, determining plaintiff to be not disabled, finding
 11 specifically in relevant part:

- 12 (1) at step one of the sequential disability evaluation process,³ plaintiff had not
 13 engaged in substantial gainful activity at any time relevant to the decision;
- 14 (2) at step two, plaintiff had “severe” impairments consisting of an anxiety disorder
 15 with features of a personality disorder, obstructive sleep apnea and a history of
 16 bilateral carpal tunnel syndrome;
- 17 (3) at step three, none of plaintiff’s impairments met or equaled the criteria of any
 18 of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;
- 19 (4) at step four, plaintiff had the residual functional capacity to perform a modified
 20 range of light work, which precluded him from performing his past relevant
 21 work; and
- 22 (5) at step five, plaintiff was capable of performing other jobs existing in significant
 23 numbers in the national economy.

24 Tr. 14-22. Plaintiff’s request for review was denied by the Appeals Council on September 30, 2006,
 25 making the ALJ’s decision the Commissioner’s final decision. Tr. 4; 20 C.F.R. § 404.981.

26 On November 27, 2006, plaintiff filed a complaint in this Court seeking review of the ALJ’s
 27 decision. (Dkt. #1). Specifically, plaintiff argues that decision should be reversed and remanded for an
 28 award of benefits or, in the alternative, for further administrative proceedings, for the following reasons:

- (a) the ALJ erred by failing to give great weight to the disability “Rating Decision”
 for plaintiff issued by the United States Department of Veterans Affairs (“VA”);

³The Commissioner employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See
 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step, the disability
 determination is made at that step, and the sequential evaluation process ends. Id.

- (b) the ALJ erred in evaluating the medical opinion evidence in the record regarding plaintiff's mental health impairments;
- (c) the ALJ erred in finding plaintiff's mental health impairments did not meet or equal the criteria of 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.06;
- (d) the ALJ erred in evaluating the lay witness evidence in the record; and
- (e) the ALJ erred in assessing plaintiff's residual functional capacity.

The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reasons set forth below, recommends that while the ALJ's decision should be reversed, this matter should be remanded to the Commissioner for further administrative proceedings. Although plaintiff requests oral argument in this matter, the undersigned finds such argument to be unnecessary here.

DISCUSSION

This Court must uphold the Commissioner's determination that plaintiff is not disabled if the Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984).

I. The ALJ Erred in Evaluating the VA's Rating Decision

Although a determination by the VA about whether a claimant is disabled is not binding on the Social Security Administration ("SSA"), an ALJ must consider that determination in reaching his or her decision. McCartey v. Massanari, 298 F.3d 1072, 1076 (9th Cir. 2002); 20 C.F.R. § 404.1504. Further, the ALJ "must ordinarily give great weight to a VA determination of disability." McCartey, 298 F.3d at 1076. This is because of "the marked similarity" between the two federal disability programs:

Both programs serve the same governmental purpose--providing benefits to those unable to work because of a serious disability. Both programs evaluate a claimant's ability to perform full-time work in the national economy on a sustained and continuing basis; both focus on analyzing a claimant's functional limitations; and both require claimants to present extensive medical documentation in support of their claims. . . .

Both programs have a detailed regulatory scheme that promotes consistency in adjudication of claims. Both are administered by the federal government, and they share a common incentive to weed out meritless claims. The VA criteria for evaluating disability are very specific and translate easily into SSA's disability framework.

Id. However, "[b]ecause the VA and SSA criteria for determining disability are not identical," the ALJ "may give less weight to a VA disability rating if he gives persuasive, specific, valid reasons for doing so that are supported by the record." Id. (citing Chambliss v. Massanari, 269 F.3d 520, 522 (5th Cir. 2001)). Here, the ALJ did not do so.

The record contains a "Rating Decision," dated October 10, 2002, in which the VA found plaintiff to be "30%" disabled due to PTSD incurred in connection with his military service during the Gulf War beginning on September 11, 1998, and "70%" disabled with respect thereto as of January 31, 2001. Tr. 200. Also contained in the record is a letter from the VA, dated February 14, 2003, in which plaintiff was noted to be "paid at the rate of 100% due to unemployability," and that he was 90% disabled as of July 1, 2002, though no indication of the cause of disability or unemployability is provided therein. Tr. 203. With respect to these two documents, the ALJ found as follows:

The VA rated the claimant 30 percent disabled in September 1998, and 70 percent disabled in January 2001 due to PTSD (Exhibit 4F: 156). On February 14, 2003, The [sic] VA awarded the claimant payments of \$2440 per month due to unemployability (Exhibit 4F: 153). While it is true that the claimant has a 100% disability rating from the VA for his impairments (Exhibit 4F: 153-156), their unique disability determination process does not adequately address the factors required for disability under the Social Security Administration's regulations. Therefore, the claimant's disability rating has been considered but not given controlling weight. The treatment records from the VA reflect improvement in his condition less than one year after treatment began.

Tr. 20.

Plaintiff argues the ALJ provided insufficient reasons for not giving "great weight" to the VA's rating decision. The undersigned agrees. As noted above, the ALJ ordinarily must do so, unless the ALJ "gives persuasive, specific, valid reasons" for not doing so "that are supported by the record." McCartey, 298 F.3d at 1076. Here, the ALJ failed to give such reasons. The first reason the ALJ did give for not adopting the VA's determination of disability was because of its "unique" disability determination process, which the ALJ found did not adequately address the factors required for determining disability in the Social Security context. However, as clearly stated by the Ninth Circuit, it is precisely because of the "marked similarity" between the two federal disability programs, that great weight normally must be given to VA determinations of disability. Id.

1 The ALJ did go on to note that the record reflects plaintiff experienced improvement in his mental
2 health symptoms less than one year after his treatment began. Be that as it may – and, as explained in
3 further detail below, indeed does appear to be the case, – this still falls far short of the type of persuasive,
4 valid and specific reasons required for giving less weight to the VA’s rating decision. The ALJ fails to make
5 any findings regarding how much plaintiff improved, and to what extent, if any, that improvement reduced
6 the percentages of disability and unemployability found by the VA. Accordingly, the undersigned finds
7 that the ALJ erred in the reasons she gave for discounting that rating decision, and therefore, on remand,
8 that decision should be re-evaluated in the manner set forth in McCartey.

9 Plaintiff argues the ALJ should have requested and secured the narrative portion of the VA’s rating
10 decision, but has not shown that the ALJ necessarily was required to do so. See Mayes v. Massanari, 276
11 F.3d 453, 459 (9th Cir. 2001) (ALJ’s duty to further develop record triggered only when there is ambiguous
12 evidence or when record is inadequate to allow for proper evaluation of evidence). It is not at all clear that
13 the evidence was sufficiently ambiguous or the record inadequate for proper evaluation thereof, or what, if
14 any, further relevant evidence the “narrative portion” would have provided. The undersigned does note
15 that plaintiff has attached to his reply brief a copy of that portion of the rating decision. Plaintiff, however,
16 has not made the proper showing in order to get that document before the Court, and thus, for the reasons
17 set forth below, the undersigned will not consider it.

18 Because this is the first time such evidence has been presented for consideration, either before this
19 Court or during the administrative review process, plaintiff must show both that it is “new” and “material”
20 to determining disability, and that he “had good cause for having failed to produce” it earlier. Id. at 462
21 (citing to 42 U.S.C. § 405(g)). To be material, “the new evidence must bear ‘directly and substantially on
22 the matter in dispute.’” Id. (citation omitted). Further, plaintiff must demonstrate a “reasonable
23 possibility” the new evidence “would have changed the outcome of the administrative hearing.” Id.
24 (citation omitted). To demonstrate “good cause,” plaintiff also must show the new evidence “was
25 unavailable earlier.” Id. at 463. Plaintiff, however, has not done so.

26 The narrative portion of the ratings decision certainly is not “new,” as it was issued on October 10,
27 2002, more than three and a half years prior to the date the ALJ issued her decision. See Plaintiff’s Reply
28 Brief, Exhibit A, p. 1. Further, while the narrative portion appears to be material, at least in the sense that

1 it bears on the specific issue in dispute here, plaintiff has not shown a reasonable possibility it would have
2 changed the outcome of this matter. Indeed, the VA notes a “higher evaluation” than 70% disability due to
3 PTSD would not be warranted, unless plaintiff could show a “total occupational and social impairment” as
4 a result of his symptoms, strongly indicating the VA did not consider him to be fully disabled at that time.
5 Id. at p. 2. Lastly, plaintiff gives no reason why he did not provide this new evidence to the ALJ, or even
6 to the Appeals Council, earlier for their consideration.

7 II. The ALJ’s Evaluation of the Medical Evidence

8 The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the
9 medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in
10 the record is not conclusive, “questions of credibility and resolution of conflicts” are solely the functions
11 of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion
12 must be upheld.” Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595, 601 (9th
13 Cir. 1999). Determining whether inconsistencies in the medical evidence “are material (or are in fact
14 inconsistencies at all) and whether certain factors are relevant to discount” the opinions of medical experts
15 “falls within this responsibility.” Id. at 603.

16 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings “must be
17 supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this “by setting out a
18 detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
19 thereof, and making findings.” Id. The ALJ also may draw inferences “logically flowing from the
20 evidence.” Sample, 694 F.2d at 642. Further, the Court itself may draw “specific and legitimate inferences
21 from the ALJ’s opinion.” Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

22 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of
23 either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a
24 treating or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific
25 and legitimate reasons that are supported by substantial evidence in the record.” Id. at 830-31. However,
26 the ALJ “need not discuss *all* evidence presented” to him or her. Vincent on Behalf of Vincent v. Heckler,
27 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original). The ALJ must only
28 explain why “significant probative evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d

1 700, 706-07 (3d Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

2 In general, more weight is given to a treating physician's opinion than to the opinions of those who
3 do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of
4 a treating physician, "if that opinion is brief, conclusory, and inadequately supported by clinical findings"
5 or "by the record as a whole." Batson v. Commissioner of Social Security Administration, 359 F.3d 1190,
6 1195 (9th Cir.,2004); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242
7 F.3d 1144, 1149 (9th Cir. 2001). An examining physician's opinion is "entitled to greater weight than the
8 opinion of a nonexamining physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion
9 may constitute substantial evidence if "it is consistent with other independent evidence in the record." Id.
10 at 830-31; Tonapetyan, 242 F.3d at 1149.

11 A. Dr. Turco

12 Plaintiff was evaluated by Ronald Turco, M.D., in early July 2002. Dr. Turco found his thought
13 processes and cognitive functioning to be normal, and noted that he was neither delusional nor psychotic.
14 Tr. 151. Dr. Turco felt plaintiff was "currently depressed," and might have "some memory difficulties."
15 Tr. 155. He diagnosed plaintiff with a major depressive disorder with post traumatic stress symptoms, and
16 opined in relevant part with respect to his employability as follows:

17 In my opinion Mr. Eash is not capable of working at his job. He is not likely to be able
18 to return to this job. He has demonstrated in the past an inability to adapt to jobs of
responsibility where expectations are placed on him. . . .

19 It is interesting to note that somehow he can continue with the computer skills and
20 computer work and yet has difficulties associated with remembering issues in the work
place. This in many respects is a contradiction in terms. . . .

21 . . . In my opinion the prognosis for Mr. Eash's return to work with the Olive Garden
22 Restaurants is poor and he is not likely to return to any job there.

23 Tr. 155-56 (emphasis in original).

24 Plaintiff argues, as he does with respect to the other medical source opinions discussed below, that
25 this opinion shows Dr. Turco did not believe plaintiff could adapt to competitive work. Clearly, though,
26 this is not what Dr. Turco concluded. Rather, Dr. Turco merely stated that in his opinion, plaintiff likely
27 would not be able to return to work for his former employer. There is no evidence in the record, however,
28 that such prohibition is inconsistent with the ALJ's assessment of plaintiff's residual functional capacity
discussed below, or would prevent him from performing other types of work. Indeed, Dr. Turco's opinion

1 appears to be in line with the ALJ's findings regarding plaintiff's ability to return to his past relevant work,
2 as the ALJ found he could not do so. As such, the undersigned finds plaintiff's argument to be without any
3 merit concerning the opinion provided by Dr. Turco.

4 B. Dr. Matteucci

5 Neal A. Matteucci, M.D., appears to have been plaintiff's primary treating physician. In late June
6 2002, plaintiff saw Dr. Matteucci primarily "to obtain a continuation of his medical leave of absence from
7 his current employment as a manager of a restaurant." Tr. 291. He told Dr. Matteucci he believed that "an
8 additional month off of work" would "allow him to sort through his priorities, consider his options, and to
9 allow time for" his "medication to become more effective." Id. However, the mental status examination
10 was fairly unremarkable, and Dr. Matteucci diagnosed plaintiff with only PTSD "by history," ruling out a
11 diagnosis of major depression due to not fully meeting the criteria therefor. Tr. 294-95. Nevertheless, Dr.
12 Matteucci assessed him with a global assessment of functioning ("GAF") score of 50, and gave him the
13 additional time off work in light of his "presentation," "clear anxiety," and "strong concern about returning
14 to work in two days," and for "medication adjustments." Id.

15 In early October 2002, plaintiff reported "clear improvement" associated with an increase in his
16 medication, including "improved mood" and a decrease in his irritability and anger. Tr. 278. In early
17 January 2003, plaintiff further reported that his mood was "'OK' overall." Tr. 274. In mid-June, and then
18 again in late July 2003, he once more reported that his mood was "'OK' overall," and that the level of his
19 irritability had "clearly decreased." Tr. 263-64. In mid-August 2003, Dr. Matteucci noticed that plaintiff
20 appeared "to have decided that since" he had received a 100% award of unemployability and the "monthly
21 support" associated therewith, he saw "less need to explore return to work options," but felt "an obligation
22 to completing the training." Tr. 228. Dr. Matteucci also stated that he had discussed plaintiff's tendency to
23 over-report the degree of his mood fluctuations. Id.

24 In early October 2003, plaintiff reported "doing relatively well overall" and having "no difficulty
25 focusing on school work when studying." Tr. 230. His mood also was "good" on presentation. Id. In
26 addition, according to Dr. Matteucci, psychological testing that was conducted indicated "a large number
27 of unusual experiences suggesting the possibility of exaggeration of complaints." Tr. 229. Other testing
28 suggested the "clear possibility of exaggeration of complaints" as well." Id. Plaintiff again reported that

1 he was “doing relatively well overall” in early November 2003, and that he found therapy and medication
2 to have been “helpful.” Tr. 231. Also, once more, plaintiff’s mood was noted to be “OK” on presentation,
3 and he reported having “no difficulty focusing on school work when studying.” Id.

4 Similar findings were made in early December 2003, as well. Tr. 232-33. Dr. Matteucci also made
5 the following comments at that time:

6 Discussed form for \$6K student loan forgiveness [sic]. He remains understanding
7 that this provider is unable to sign the form, thereby stating per form text, that there is
8 no anticipation he will improve. Discussed again that there is the expectation that
9 improvement will occur. He states plan to ask neuropsych [sic] evaluator to sign form,
because “they told me there was no chance I would get better and that the test was
100% accurate”. Discussed that this was an unlikely statement to be made by
neuropsych [sic].

10 Id. These comments and substantially similar findings, and reports in terms of the benefits received from
11 therapy and medication, were repeated in February and March 2004. Tr. 233-34, 403.

12 Plaintiff continued to report getting benefit from his therapy and medication through December
13 2004. Tr. 374-75, 377, 396, 401. Indeed, in early October 2004, Dr. Matteucci told plaintiff he did not
14 believe that loan forgiveness “based on the provideded [sic] definition of disability . . . appropriate given
15 his presentation, improvement, current performance in school and future plans.” Tr. 377. In both early and
16 late March 2005, plaintiff denied having any “acute concerns.” Tr. 363. In mid-July 2005, he reported
17 benefitting not only from his medication, but also from working out, which he stated helped his mood and
18 level of agitation. Tr. 354. A similar report of “clear benefit” from medication was made by him in early
19 August 2005, as well. Tr. 351.

20 With respect to the findings and opinions of Dr. Matteucci, the ALJ found as follows:

21 [D]uring his initial assessment on June 17, 2002, Dr. Matteucci estimated the
22 claimant’s global assessment of functioning (GAF) to equal 50, which denotes a serious
23 impairment in social and occupational functioning (Exhibit 4F: 62). However, this
24 appears to be inconsistent with the results of the mental status examination included in
25 his clinical note, that exam showed intact concentration and memory, and no suicidal or
26 homicidal ideation. Also, the doctor said he would allow the claimant to have an
27 additional month off work (Exhibit 4F: 61-62). This indicates he did not view the
28 claimant’s condition as indefinitely preventing work. Dr. Matteucci’s follow-up notes
consistently list the claimant’s diagnosis as “rule out” PTSD, based apparently on signs
of symptom exaggeration on the claimant’s part, and inconsistencies in the claimant’s
history (Exhibits 4F: 123, 125, 127, etc.). Notably, Dr. Matteucci did not provide any
further estimates of the claimant’s GAF. On October 4, 2004, he opined that the
claimant’s disability was not clear, in light of his presentation, improvement, current
performance in school and future plans (Exhibit 9F: 236). This reflects that the
claimant’s condition had improved and the doctor did not view him as totally disabled.

1 Tr. 19. The undersigned agrees with the ALJ's analysis of the medical opinion evidence contained in the
2 record obtained from Dr. Matteucci.

3 As with Dr. Turco, plaintiff argues Dr. Matteucci believed he could not adapt to competitive work.
4 Clearly this is not the case, however, as Dr. Matteucci, as noted above, gave plaintiff permission to remain
5 off work for a period of at most one month in late June 2002. As pointed out by the ALJ, furthermore, Dr.
6 Matteucci also noted findings indicative of plaintiff's tendency to exaggerate symptoms, and told plaintiff
7 that he would not sign any document stating plaintiff was permanently disabled, but rather informed him
8 that he expected he would improve. As such, the undersigned also finds plaintiff's argument with respect
9 to Dr. Matteucci to be without merit.

10 C. Dr. Monkarsh

11 Plaintiff was evaluated by Gary P. Monkarsh, Ph.D., in late September, 2002. During the mental
12 status examination, plaintiff was oriented, had clear, coherent and goal-directed speech, and displayed
13 good eye contact. Tr. 218. While plaintiff admitted to a recent history of suicidal ideation and displayed a
14 flat affect, he denied any history of homicidal or psychotic ideation. Id. Dr. Monkarsh diagnosed plaintiff
15 with "chronic and severe" PTSD, and noted specifically that he appeared to suffer from an increase in his
16 PTSD symptoms. Id. He also diagnosed plaintiff with a dysthymic disorder secondary to his PTSD, and
17 assessed him with a GAF score of 45-50. Id. Finally, Dr. Monkarsh opined that plaintiff appeared to
18 "suffer from severe overall emotional and industrial impairment and moderate to severe social
19 impairment" as a result of his diagnosed conditions and symptoms. Id.

20 Although the ALJ did not specifically address the findings of Dr. Monkarsh, those findings also do
21 not support plaintiff's contention that Dr. Monkarsh believed he was incapable of adapting to competitive
22 work. Indeed, while Dr. Monkarsh did opine that plaintiff appeared to suffer from severe emotional and
23 industrial impairment, he provided no specific opinion regarding an ability to remain competitive in a
24 work environment. Nor did Dr. Monkarsh define what he meant by the term "severe." Nevertheless, since
25 this term does denote, or at least is indicative of, serious mental functional impairment, the undersigned
26 finds the ALJ erred in not addressing this medical opinion evidence. Accordingly, on remand, re-
27 consideration of such evidence shall be undertaken.

1 D. Dr. Swiercinsky

2 Dennis P. Swiercinsky, Ph.D., conducted an independent neuropsychological examination of
3 plaintiff in late June 2003. Dr. Swiercinsky noted that while plaintiff's "[g]lobal severity index" indicated
4 "an expressed marked level of overall physical and emotional" self-reported distress, he "did not appear so
5 intensively distressed at any time throughout" the examination. Tr. 188. Upon examination, plaintiff's eye
6 contact was normal, as was his global thinking, mental processing speed, general alertness, overall rate of
7 response, ability to understand and perform test demands, and ability to maintain stamina and frustration
8 tolerance. Tr. 190-91. His mood and affect also were adequate, and his working memory and functional
9 intelligence were both normal as well. Tr. 190-94.

10 Although plaintiff's "ability to adapt in social interactions and maintain an appropriate level of
11 maturity" was "at least questionable and probably deficient," Dr. Swiercinsky found "no obvious evidence
12 for any acquired neuropsychological disorder." Tr. 197. As such, plaintiff demonstrated "no overall
13 deterioration" or "specific cognitive areas that would be correlated with known neurological processes."
14 Tr. 197. Dr. Swiercinsky did find that plaintiff's "average intellectual capability" was "functionally
15 weakened somewhat by low reading level," and that his anxiety tended "to interfere with performance
16 under timed (stressful) situations." Tr. 198. Thus, he diagnosed plaintiff with an anxiety disorder and as
17 having the characteristics of a native verbal learning disability. Id.

18 On the other hand, Dr. Swiercinsky noted that plaintiff's "ability to maintain relationships" with
19 co-workers and supervisors might be improving. Id. Further, Dr. Swiercinsky felt plaintiff's prognosis
20 was "good for improved general performance as he continues with treatment and education through the
21 VA program." Id. The ALJ, therefore, rightly pointed out that while Dr. Swiercinsky concluded plaintiff's
22 prognosis for improvement was good, he "offered no opinion" regarding his residual functional capacity.
23 Tr. 19. Accordingly, it is difficult to understand, to say the least, the basis for plaintiff's argument that Dr.
24 Swiercinsky too believed plaintiff could not adapt to competitive work. Indeed, the undersigned finds that
25 he did not give any such opinion, and that the ALJ did not err in evaluating the findings and opinions Dr.
26 Swiercinsky did provide.

27 E. Dr. Wittkopp

28 Plaintiff underwent an independent psychiatric evaluation by George F. Wittkopp, M.D., in mid-

1 July 2003. Right away, Dr. Wittkopp noted plaintiff was not being entirely truthful in what he was self-
2 reporting. Tr. 157; see also 163, 165, 167. Dr. Wittkopp also noted those aspects of plaintiff's medical
3 history, in which it was observed that he was focused primarily on obtaining disability and remaining off
4 work. Tr. 159. Indeed, on formal testing plaintiff "received a moderate elevation on the 'fake bad' scale,"
5 which suggested "a willingness to report distressing symptoms if not some tendency to overemphasize or
6 exaggerate them." Tr. 169.

7 On the other hand, Dr. Wittkopp did find the above testing showed the following:

8 The profile indicates intense and unreleased anger and accumulated resentments. He
9 also has an exquisite sensitivity to criticism. His responses suggest fixed paranoid
10 projections of his anger and possibly delusional beliefs. The current level of
organization of his day-to-day functioning and immediate practical self-sufficiency
tests as severely disorganized and essentially collapsed.

11 He tests as severely anxious, tense, fearful, and self-preoccupied. His anxieties are
12 likely to involve obsessive thinking. He also tests as depressed, self-negative and self-
critical. Abrupt mood changes are likely.

13 The pattern suggests distressing somatic complaints that are either emotional in origin
14 or involve strongly functional elements. He tests as poorly tolerating frustration and
the profile suggests a mild to moderate suicide risk.

15 Tr. 169-70. On mental status examination, plaintiff also appeared to be "quite anxious," and Dr. Wittkopp
16 found there to be "a prominent thought disorder." Tr. 170. Specifically, Dr. Wittkopp noted that plaintiff
17 had "a very difficult time putting together a coherent stream of thought." Id. He was alert and oriented to
18 objective testing, but his fund of knowledge was "somewhat limited." Id. Insight and judgment also were
19 "both questionable." Id.

20 Dr. Wittkopp diagnosed plaintiff with a bipolar disorder, a "strongly suspected" attention deficit
21 disorder, an anxiety disorder with "some PTSD symptoms," a "[m]ixed personality trait disturbance" with
22 paranoid, obsessive and dependent features, and a GAF score of 60, indicating "serious impairments in
23 most life spheres including vocational and interpersonal activities." Tr. 172. Dr. Wittkopp, however, noted
24 that the diagnosis of PTSD was "problematic," and that the severity of plaintiff's depression did not seem
25 to rise to the level of a major depressive disorder. Id. While plaintiff also appeared "severely disturbed,"
26 Dr. Wittkopp noted he had received some benefit from medication. Tr. 173.

27 In terms of the conflicts in plaintiff's medical history, Dr. Wittkopp stated that although some of
28 them seemed "to result from confusion," some of it "clearly" was "related to outright prevarication." Tr.

171. Dr. Wittkopp further noted that while plaintiff endorsed “a number of symptoms of PTSD,” he did “not spontaneously report them or really complain of them.” Id. He felt plaintiff probably had attention deficit disorder “all of his life,” which, superimposed on his bipolar disorder, resulted in “severe mood swings.” Id. In terms of motivation to work, though, Dr. Wittkopp specifically stated that:

He is obviously very much interested in the compensation issue. He states he is earning quite a bit more money now than he was working in the restaurant, and he enjoys the fact that it allows him the freedom to do some things such as go to school – even though he knows that this schooling will lead to no productive employment.

Id. Finally, with respect to his opinions concerning the level of plaintiff’s disability and his ability to work and return to work, Dr. Wittkopp commented in relevant part as follows:

I doubt that he could or would adapt to a situation in the competitive work environment at this point in time. Now that he is on 100% disability, he has really no motivation to return to work. He also remains emotionally volatile and labile and would undoubtedly have more conflicts and altercations with coworkers. . . .

. . . I believe he must be considered totally disabled at this time and for the foreseeable future.

. . . This [when plaintiff could return to full or modified duty] can not be answered at this time because it depends upon multiple variables including his response to trials of therapy for other diagnoses. As mentioned above, he has no motivation to return to any sort of work that I can detect at this time. It is possible that if, indeed, he does have Bipolar Disorder as I strongly suspect, and if that is appropriately treated, he may feel good enough to want to return to work in some fashion.

. . . I believe that he will always be mentally ill in some way and have to be treated psychiatrically in some way. To what extent his symptoms can be controlled remains to be seen.

Tr. 173-74.

In regard to Dr. Wittkopp’s opinion regarding plaintiff’s mental functional capabilities, disability and ability to work, the ALJ found as follows:

On July 16, 2003, Dr. Wittkopp estimated the claimant’s global assessment of functioning (GAF) as 60, which he indicated “denotes serious impairments in most life spheres, including vocational and interpersonal activities” (Exhibit 2F:16). This is inconsistent because a GAF of 60 is generally used to denote a moderate impairment in social or occupational functioning. In addition, Dr. Wittkopp opined that the claimant was “totally disabled at this time and for the foreseeable future” (Exhibit 2F:17). This opinion is inconsistent with the VA treatment records, as well as Dr. Swiercinsky’s findings from June 27, 2003, and the undersigned gives it little weight. It is not objective and appears to be based on subjective complaints. Since the claimant is not very credible, reliance on his allegations is not persuasive. It is also noted that Dr. Wittkopp indication [sic] that some of the claimant’s reported history was “outright prevarication” (Exhibit 2F:22). The doctor should have been aware of the claimant’s credibility problems.

1 Tr. 19-20. Again, the undersigned finds the ALJ presented valid reasons for not finding the opinion of Dr.
2 Wittkopp regarding the impact of plaintiff's impairments to be as significant as indicated, let alone support
3 a finding of disability. Indeed, it appears Dr. Wittkopp was well aware of plaintiff's credibility problems
4 and issues with motivation, and seemed to have based his disability opinion to a large degree on this latter
5 factor. That alone calls into question the reliability of Dr. Wittkopp's opinion. The undersigned further
6 notes plaintiff has presented no specific argument challenging the ALJ's particular findings on this issue,
7 as he also has failed to do with respect to the other medical sources discussed above.

8 F. Drs. Houck and Lewis

9 A psychiatric review technique form was completed by Trevelyn Houck, Ph.D., and Janis Lewis,
10 Ph.D., in mid-November 2003. Drs. Houck and Lewis diagnosed plaintiff with a learning disorder and
11 PTSD. Tr. 308, 312. They found plaintiff to be mildly restricted in his activities of daily living and to have
12 moderate difficulties in maintaining social functioning and in maintaining concentration, persistence or
13 pace. Tr. 317. There was insufficient evidence of episodes of decompensation. Id. At the same time, Dr.
14 Houck and Dr. Lewis completed a mental residual functional capacity assessment form, in which they also
15 found plaintiff to be moderately limited in his ability to: understand, remember and carry out detailed
16 instructions; maintain attention and concentration; complete a normal workday and workweek, perform at
17 a consistent pace; interact appropriately with the general public; and get along with co-workers or peers.
18 Tr. 321-22. Lastly, Drs. Houck and Lewis commented that plaintiff could "complete semi-skilled and
19 some skilled tasks" with "adequate attention to complete" a workday and workweek, and that he would
20 "do best with a few co-workers and limited public contact." Tr. 323.

21 The ALJ summarized the findings of Dr. Houck and Dr. Lewis in her decision, and stated that
22 while she disagreed with "some aspects" of their determination, she agreed with their "general conclusion"
23 that plaintiff was "capable of simple and some detailed tasks" not involving "extensive social interaction."
24 Tr. 20. Plaintiff argues the ALJ failed to provide any explanation as to why she did not adopt any of the
25 other moderate limitations found by Drs. Houck and Lewis. The undersigned agrees to a degree. At the
26 outset, however, it must be noted that the undersigned finds no error with the ALJ's determination that
27 plaintiff was capable of performing simple and some detailed tasks not involving extensive social
28 interaction, and that, in this sense, the ALJ did adopt most of the above two psychologists' limitations.

For example, a restriction to “some” detailed tasks is not inconsistent with a moderate limitation in that area.⁴ That is, nothing in the record indicates the ALJ’s view that such a limitation reduces plaintiff’s ability with respect to detailed tasks from “all” to only “some” is unreasonable. The same is true in regard to the restriction to no extensive social interaction and moderate limitations in the ability to get along with co-workers and peers and interact appropriately with the public. On the other hand, plaintiff is correct in noting the ALJ gave no reasons, other than the fact that she simply disagreed therewith, for not adopting the moderate limitations on completing a normal workday and workweek, performing at a consistent pace, and maintaining attention and concentration. To this extent, therefore, the ALJ erred.

III. The ALJ’s Step Three Analysis Was Proper

At step three of the sequential disability evaluation process, the ALJ must evaluate the claimant’s impairments to see if they meet or equal any of the impairments listed in 20 C.F. R. Part 404, Subpart P, Appendix 1 (the “Listings”). 20 C.F.R § 404.1520(d); Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). If any of the claimant’s impairments meet or equal a listed impairment, he or she is deemed disabled. Id. The burden of proof is on the claimant to establish he or she meets or equals any of the impairments in the Listings. Tackett, 180 F.3d at 1098.

A mental or physical impairment “must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques.” 20 C.F.R. § 404.1508. It must be established by medical evidence “consisting of signs, symptoms, and laboratory findings.” Id. An impairment meets a listed impairment “only when it manifests the specific findings described in the set of medical criteria for that listed impairment.” SSR 83-19, 1983 WL 31248 *2. An impairment equals a listed impairment “only if the medical findings (defined as a set of symptoms, signs, and laboratory findings) are at least equivalent in severity to the set of medical findings for the listed impairment.” Id. at *2. However, “symptoms alone” will not justify a finding of equivalence. Id.

Plaintiff argues the VA’s rating decision and award of unemployability benefits and the medical opinion source evidence discussed above supports an outright award of benefits under 20 C.F. R. Part 404,

⁴Initially the ALJ found plaintiff capable of performing detailed tasks (Tr. 17), but then later on found he was capable of performing only “some” detailed tasks (Tr. 20). Regardless of which finding the ALJ actually intended to make in her decision, the undersigned shall attribute the latter finding to the ALJ, as it more accurately reflects the findings made by Dr. Houck and Dr. Lewis, and the evidence in the record overall, as explained above.

1 Subpart P, Appendix 1, § 12.06. With respect to whether or not plaintiff's impairments met or equaled the
2 criteria of Listing 12.06, the ALJ found as follows:

3 The undersigned has specifically considered section 12.06, concerning anxiety
4 disorders . . . The criteria of section 12.06 require medical documentation of certain
5 symptoms of anxiety. These symptoms are: generalized persistent anxiety; or a
6 persistent irrational fear and resulting avoidance of a specific object, activity or
7 situation; or recurrent severe panic attacks occurring on the average of at least once per
8 week; or recurrent obsessions or compulsions resulting in marked distress; or recurrent
9 and intrusive recollections of a traumatic experience, which are a source of marked
10 distress. Furthermore, these symptoms must result in (B) at least two of the following:
11 marked restriction of activities of daily living; marked difficulties in maintaining social
12 functioning; marked difficulties in maintaining concentration, persistence or pace; or
13 repeated episodes of decompensation, each of extended duration. Alternatively (C),
14 there must be medical documentation of a complete inability to function outside the
15 area of one's home. In this case the claimant has failed to demonstrate the marked
16 level of impairment described in (B) or any of the special situations described in (C).

17 Tr. 16.

18 Plaintiff makes no specific challenge to any of the particular findings the ALJ made with respect to
19 Listing 12.06, nor does he provide any explanation for why he asserts the VA's rating decision and award
20 of employability or the medical source opinion evidence in the record supports a finding of disability
21 under step three of the sequential disability evaluation process. Perhaps that is because he cannot do so,
22 and such evidence does not support his position on this issue. Indeed, the undersigned finds nothing in the
23 record to support that position, including the VA's findings. There is no indication that the VA ever
24 considered, let alone was aware of, the criteria for meeting Listing 12.06, or based their determination of
25 unemployability thereon. Further, as clearly can be seen from the above discussion, the medical opinion
26 source evidence in the record also hardly supports plaintiff's position here. Accordingly, the undersigned
27 finds such position to be completely without merit.

28 IV. The ALJ Erred in Failing to Consider the Lay Witness Evidence in the Record

Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must take into
account," unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to
each witness for doing so." Lewis v. Apfel, 236 F.3d, 503, 511 (9th Cir. 2001). An ALJ may discount lay
testimony if it conflicts with the medical evidence. Id.; Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir.
1984) (proper for ALJ to discount lay testimony that conflicts with available medical evidence). In
rejecting lay testimony, the ALJ need not cite the specific record as long as "arguably germane reasons"
for dismissing the testimony are noted, even though the ALJ does "not clearly link his determination to

those reasons,” and substantial evidence supports the ALJ’s decision. Lewis, 236 F.3d at 512. The ALJ also may “draw inferences logically flowing from the evidence.” Sample, 694 F.2d at 642.

Plaintiff argues that nowhere in her decision did the ALJ discuss the lay evidence in the record from his wife and mother. That evidence consists of statements and answers to questions provided by these two lay witnesses concerning their observations of plaintiff’s symptoms and limitations. See Tr. 94-103, 145-47. This is competent evidence the ALJ is required to address, and provide germane reasons for rejecting with respect thereto. The ALJ did not do so, and to that extent she erred.⁵ The undersigned does not agree, however, with plaintiff’s contention that the nature of the lay evidence the ALJ failed to properly consider requires an outright award of benefits. Plaintiff makes no argument as to why he believes that evidence in itself clearly establishes his disability and entitlement to benefits. Indeed, in light of the medical opinion source evidence discussed above, such a conclusion is entirely premature.

V. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity

If a disability determination “cannot be made on the basis of medical factors alone at step three of the evaluation process,” the ALJ must identify the claimant’s “functional limitations and restrictions” and assess his or her “remaining capacities for work-related activities.” SSR 96-8p, 1996 WL 374184 *2. A claimant’s residual functional capacity assessment is used at step four to determine whether he or she can do his or her past relevant work, and at step five to determine whether he or she can do other work. Id. It thus is what the claimant “can still do despite his or her limitations.” Id.

A claimant’s residual functional capacity is the maximum amount of work the claimant is able to perform based on all of the relevant evidence in the record. Id. However, a claimant’s inability to work must result from his or her “physical or mental impairment(s).” Id. Thus, the ALJ must consider only those limitations and restrictions “attributable to medically determinable impairments.” Id. In assessing a claimant’s residual functional capacity, the ALJ also is required to discuss why the claimant’s “symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical or other evidence.” Id. at *7.

⁵Defendant argues that to the extent the ALJ erred here, such error was harmless. Where, however, “the ALJ’s error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination.” Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1056 (9th Cir. 2006). Because the undersigned cannot so conclude, the ALJ’s error was not harmless.

1 Here, the ALJ assessed plaintiff with the following residual functional capacity:

2 [T]he claimant has the residual functional capacity to lift and carry twenty pounds
3 occasionally and ten pounds frequently. During an eight-hour day he can stand and
4 walk for six hours; and he can sit for six hours. He can frequently do bilateral
5 handling; and can do occasional kneeling, crouching, crawling and use of ladders, ropes
or scaffolds. In addition, the claimant should avoid concentrated exposure to noise and
hazardous conditions. He is capable of performing simple and [some]⁶ detailed tasks
not involving extensive social interaction.

6 Tr. 17. Plaintiff argues that in light of the errors he asserts the ALJ made and discussed above, her reliance
7 on this assessment of his residual functional capacity to deny him benefits is precluded. The undersigned
8 agrees that due to the errors the ALJ made in evaluating the VA's rating decision, the findings and
9 opinions of Drs. Monkarsh, Houck and Lewis, and the lay evidence in the record, it was improper for her
10 to rely on the residual functional capacity with which she assessed plaintiff, as it is not clear that it
11 completely and accurately describes all of plaintiff's mental functional limitations.

12 VI. This Matter Should Be Remanded for Further Administrative Proceedings

13 The Court may remand this case "either for additional evidence and findings or to award benefits."
14 Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the proper course,
15 except in rare circumstances, is to remand to the agency for additional investigation or explanation."
16 Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is "the unusual case in
17 which it is clear from the record that the claimant is unable to perform gainful employment in the national
18 economy," that "remand for an immediate award of benefits is appropriate." Id.

19 Benefits may be awarded where "the record has been fully developed" and "further administrative
20 proceedings would serve no useful purpose." Smolen, 80 F.3d at 1292; Holohan v. Massanari, 246 F.3d
21 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

22 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant's]
23 evidence, (2) there are no outstanding issues that must be resolved before a
determination of disability can be made, and (3) it is clear from the record that the ALJ
would be required to find the claimant disabled were such evidence credited.

24 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002). Because
25 issues still remain regarding plaintiff's residual functional capacity, and, by implication, his ability to do
26 other work existing in significant numbers in the national economy, this matter should be remanded to the
27

28 ⁶As discussed above, the undersigned finds this portion of the ALJ's assessment of plaintiff's residual functional capacity
should read be read as "some detailed tasks." See Tr. 20.

1 Commissioner for further administrative proceedings.

2 Plaintiff argues that crediting the VA's rating decision and award of unemployability benefits and
 3 the medical opinion source and lay witness evidence in the record, an outright award of benefits should be
 4 ordered. However, while the ALJ did err in evaluating the VA's rating decision, it is not at all clear that
 5 the ALJ would be required to equate that decision with entitlement to disability benefits under the Social
 6 Security rules and regulations. First, as discussed above, plaintiff has not shown the VA's rating decision
 7 established plaintiff should have been found disabled under Listing 12.06. Second, also as discussed
 8 above, "a VA rating of disability does not necessarily compel the SSA to reach an identical result."
 9 McCartey, 298 F.3d at 1076 (citing 20 C.F.R. § 404.1504). Thus, because "the criteria applied by the two
 10 agencies" are not identical, "[a] VA rating of total and permanent disability is not legally binding on the
 11 Commissioner." Chambliss, 269 F.3d at 522.

12 In defining the term "individual unemployability," for example, the VA uses the term
 13 "substantially gainful occupation." 38 C.F.R. § 4.16(a), (b). Section 4.16 further reads in relevant part:

14 (a) Total disability ratings for compensation may be assigned, where the schedular
 15 rating is less than total, when the disabled person is, in the judgment of the rating
 16 agency, unable to secure or follow a substantially gainful occupation as a result of
 17 service-connected disabilities

18 (b) It is the established policy of the Department of Veterans Affairs that all veterans
 19 who are unable to secure and follow a substantially gainful occupation by reason of
 20 service-connected disabilities shall be rated totally disabled.

21 The VA regulations concerning disability ratings, however, do not define the term "substantially gainful
 22 occupation." Thus, it is not at all clear "substantially gainful occupation" has the meaning "substantial
 23 gainful activity" does in the Social Security disability context.⁷

24 The term "disability" is defined in the Social Security Act to mean the inability to "to engage in
 25 any substantial gainful activity by reason of any medically determinable physical or mental impairment
 26 which can be expected to result in death or which has lasted or can be expected to last for a continuous
 27 period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The VA regulations concerning disability

28 ⁷In contrast, "substantial gainful activity" is defined "as work that 'involves doing significant physical or mental activities' and 'is the kind of work usually done for pay or profit.'" Soria v. Callahan, 16 F. Supp.2d 1145, 1149 (C.D. Cal. 1997) (quoting 20 C.F.R. § 416.972(a), (b)). Work may be substantial "even if it is done on a part-time basis." Id. (quoting Byington v. Chater, 76 F.3d 246, 250 (9th Cir. 1996)). It is gainful "if it is the kind of work usually done for pay or profit, whether or not a profit is realized." Id. at 1150 (quoting 20 C.F.R. §§ 404.1572(b), 416.972(b)).

1 ratings provide that an individual will be considered “unemployable” under the following circumstances:

2 [U]pon termination of employment which was provided on account of disability, or in
3 which special consideration was given on account of the same, when it is satisfactorily
shown that he or she is unable to secure further employment.

4 38 C.F.R. § 4.18 (emphasis added). Thus, it seems that, unlike in the Social Security context, an
5 individual may be deemed “unemployable” if he or she cannot find employment. See 20 C.F.R. §
6 404.1566(a) (work exists in national economy for step five disability evaluation purposes when it exists in
7 the region where claimant lives or in several other regions, regardless of whether it exists in claimant’s
8 immediate area, there are specific job vacancies open, or claimant would be hired if he or she applied).

9 Similarly, the VA regulations concerning disability ratings also state that “[t]otal disability ratings
10 for compensation may be assigned” if the “disabled person is . . . unable to secure or follow a substantially
11 gainful occupation as a result of service-connected disabilities.” 38 C.F.R. § 4.16(a) (emphasis added); see
12 also 38 C.F.R. § 4.16(b) (“[A]ll veterans who are unable to secure and follow a substantially gainful
13 occupation by reason of service-connected disabilities shall be rated totally disabled.”) (emphasis added).

14 In addition, those regulations provide that the disability rating:

15 is based primarily upon the average impairment in earning capacity, that is, upon the
16 economic or industrial handicap which must be overcome and not from individual
success in overcoming it.

17 38 C.F.R. § 4.15 (emphasis added). “Total disability” also “will be considered to exist when there is
18 present any impairment of mind or body which is sufficient to render it impossible for the average person
19 to follow a substantially gainful occupation.” Id. On the other hand, in the Social Security context, a
20 determination of disability clearly requires the individual claimant to be unable work based on his or her
21 medically determinable impairments. See, e.g., 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1520.

22 The medical opinion source evidence in the record, furthermore, as discussed above hardly
23 supports a finding of disability and outright award of benefits. The same is true with respect to the
24 evidence in the record from the two lay witnesses,⁸ particularly in light of the medical opinion evidence in

25
26 ⁸It is true that where lay witness evidence is improperly rejected, that testimony may be credited as a matter of law. See
27 Schneider v. Barnhart, 223 F.3d 968, 976 (9th Cir. 2000) (finding that when lay evidence rejected by ALJ is given effect required
28 by federal regulations, it became clear claimant’s limitations were sufficient to meet or equal listed impairment). As noted by the
Ninth Circuit, however, the courts do have “some flexibility” in how they apply the “credit as true” rule. Connett, 340 F.3d at 876.
Further, Schneider dealt with the situation where the Commissioner failed to cite any evidence to contradict the statements of five
lay witnesses regarding her disabling impairments. 223 F.3d at 976. Here, in contrast, as discussed above, there is ample evidence
in the record indicating plaintiff may not be as impaired as he, his wife and his mother have alleged.

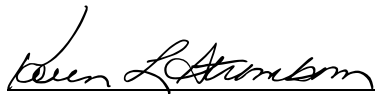
1 the record and the evidence in the record concerning plaintiff's issues of credibility. Indeed, as pointed out
2 by defendant, plaintiff has not even challenged the ALJ's findings regarding those issues. As such, the
3 proper course to take in this matter is remand to the Commissioner for further proceedings. While plaintiff
4 requests that on remand a medical expert and vocational expert be required to testify at a new hearing,
5 such a determination is more appropriate for the Commissioner to make as he deems necessary.

6 CONCLUSION

7 Based on the foregoing discussion, the Court should find the ALJ improperly concluded plaintiff
8 was not disabled, and should reverse the ALJ's decision and remand this matter to the Commissioner for
9 further administrative proceedings in accordance with the findings contained herein.

10 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b),
11 the parties shall have ten (10) days from service of this Report and Recommendation to file written
12 objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
13 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
14 imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **October 5,**
15 **2007**, as noted in the caption.

16 DATED this 6th day of September, 2007.

17
18 

19 Karen L. Strombom
20 United States Magistrate Judge
21
22
23
24
25
26
27
28